BRB No. 07-0553

J.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHIPPERS STEVEDORING COMPANY, INCORPORATED	)	DATE ISSUED: 11/21/2007<u>2007</u>
	)	
Self-Insured Employer-Petitioner	)	
		DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Stephen Vaughan (Tucker, Vaughan, Gardner & Barnes, PC), Houston, Texas, for claimant.

C. Douglas Wheat (Wheat, Oppermann & Meeks, P.C.), Houston, Texas, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2006-LHC-221) of Administrative Law Judge Patrick M. Rosenow rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant sustained injuries to his shoulder, ankle, toes, ribs, lumbar and cervical back, and neck when, while working for employer as a clerk/checker on November 29, 2003, he was hit by a loose timber and fell onto his chest. Employer terminated its voluntary payment of total disability benefits on May 17, 2004, when it received Dr.

Vanderweide's assessment that claimant had reached maximum medical improvement with regard to his work injuries and was fit to return to his regular work duty without restrictions. Claimant thereafter filed a claim seeking additional benefits related to his alleged continuing work-related back condition.

In his decision, the administrative law judge found that claimant is entitled to invocation of the Section 20(a) presumption with regard to his present back condition, 33 U.S.C. §920(a), and that employer established rebuttal thereof. The administrative law judge then concluded, based on the evidence of record as a whole, that claimant's current back condition was caused, aggravated, and/or accelerated by his work accident of November 29, 2003. The administrative law judge next found that claimant is totally disabled as he established that he cannot return to his usual employment and employer offered no evidence as to the availability of suitable alternate employment. The administrative law judge therefore concluded that claimant is entitled to temporary total disability benefits from November 29, 2003,[1] and medical benefits related to his work injuries.

On appeal, employer challenges the administrative law judge's finding that claimant is entitled to temporary total disability and medical benefits, as well as his calculation of claimant's average weekly wage under Section 10(c) of the Act, 33 U.S.C. §910(c). Claimant responds, urging affirmance.

Employer asserts that the administrative law judge erred in concluding that claimant is totally disabled as Dr. Vanderweide gave claimant a full release to return to regular work duty on May 17, 2004. Employer maintains that Dr. Vanderweide's opinion, in conjunction with claimant's testimony that his regular work as a clerk checker is not a physically demanding job, establishes that claimant can return to his usual work without any restrictions or loss in wage-earning capacity, thereby making it unnecessary for employer to submit any evidence of suitable alternate employment.

To be entitled to total disability benefits, the claimant bears the initial burden of establishing his inability to perform his usual work as a result of his work injury. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998). If a claimant establishes a *prima facie* case of total disability, then he is considered totally disabled unless and until his employer satisfies its burden of establishing the availability of

[1] The administrative law judge determined that while claimant reached maximum medical improvement with regard to his ankle and ribs, he could not discern from the existing record as to whether claimant has attained maximum medical improvement as to his back, neck and shoulder.

suitable alternate employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

Following an extensive review of the medical evidence, Decision and Order at 11-25, the administrative law judge credited the testimony and opinions of Drs. Moers, Eidman and Nowlin, that claimant is not able to return to work as a clerk/checker,[2] over the contrary opinion of Dr. Vanderweide, that claimant has been capable of such employment since May 14, 2004. In making this determination, the administrative law judge relied on the fact that Drs. Moers and Eidman, as claimant's treating physicians, saw claimant multiple times over an extended period, while Dr. Vanderweide saw claimant on only one occasion.[3] Decision and Order at 26. Additionally, the administrative law judge found the basis of Dr. Vanderweide's opinion suspect as Dr. Vanderweide relied on the fact that claimant did not report radicular symptoms or any pain in his low back, ankles, left shoulder, arms, fingers, or left foot, which is inconsistent with other evidence of record indicating that claimant consistently complained to his treating physicians of such symptoms. Decision and Order at 26.

The administrative law judge's decision to accord determinative weight to claimant's testimony and the opinions proffered by Drs. Moers, Eidman and Nowlin is rational and within his discretion as trier of fact, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), and therefore, the administrative law judge's finding that claimant established a *prima facie* case of total disability is affirmed as it is supported by substantial evidence. *Devor v. Dep't of the Army*, 41 BRBS 77 (2007); *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). Moreover, we affirm the administrative law judge's finding that claimant is totally disabled, as employer did not submit any evidence of suitable alternate employment. *Marinelli*, 34 BRBS 112; *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989); *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988).

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[2] The administrative law judge also relied, in part, on claimant's testimony that he is incapable of performing his pre-injury job because he is "constantly hurting" and "always miserable with pain." HT at 35.

[3] The administrative law judge added that although Dr. Nowlin, like Dr. Vandeweide, only saw claimant once, his opinion is consistent with those of Drs. Moers and Eidman.

Employer next argues that the administrative law judge's calculation of claimant's average weekly wage pursuant to Section 10(c) is erroneous, as he did not consider claimant's complete pre-injury wage earnings. In particular, employer maintains that the administrative law judge's failure to account for all of the years within that pre-injury period of time, *i.e.*, 1996-2003, is contrary to the applicable legal standard espoused in *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991).

Section 10, 33 U.S.C. §910, sets forth three alternative methods for determining claimant's average annual wage, which is then divided by 52 pursuant to Section 10(d), 33 U.S.C. §910(d), to arrive at an average weekly wage. Sections 10(a) and (b), 33 U.S.C. §910(a), (b), are the statutory provisions relevant to a determination of an employee's average annual wages where an injured employee's work is regular and continuous. The computation of average annual earnings must be made pursuant to Section 10(c), 33 U.S.C. §910(c), if subsections (a) or (b) cannot be reasonably and fairly applied.[4] *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000).

The object of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of his injury. *Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). Although Section 10(c) permits the use of wages from the claimant's other prior employment in an average weekly wage calculation, it does not require such use, as the administrative law judge is afforded wide discretion in arriving at a Section 10(c) calculation. *See generally Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339, 344-345 (1988).

Examining claimant's earnings, Decision and Order at 26; *see also* CX 8-11, EX 11-12, the administrative law judge concluded that a fair and reasonable approximation of claimant's pre-injury wage-earning capacity involves taking an aggregate of claimant's annual earnings for 1998 and 1999, as claimant worked consistently during this time frame. In contrast, the administrative law judge found that the use of claimant's annual earnings from 2000 to 2003 would unfairly penalize him for periods of missed wages due to personal injury or illness. *See generally Klubnikin v. Crescent Wharf & Warehouse*

[4] In the instant case, the parties agreed, as the administrative law judge acknowledged, that Section 10(c) must be used to calculate claimant's average weekly wage. Decision and Order at 3.

Co., 16 BRBS 182 (1984); *Richardson*, 14 BRBS 855. The administrative law judge thus concluded that claimant's average annual earnings are $27,267.00, resulting in an average weekly wage of $524.36.

We reject employer's argument that *Gatlin* requires the administrative law judge herein to use claimant's earnings for the entire period between 1996 and 2003.[5] In *Gatlin*, the claimant was injured while on the second day of his job as a longshoreman for employer on April 23, 1986. The record established that claimant had worked regularly as a salesman for one employer between 1982 and 1984, but that his work between the end of 1984 through the time of his accident was intermittent at various jobs for different employers. The administrative law judge found, under Section 10(c), that claimant's wage-earning capacity should be based on his pre-injury wages between 1982-1984 as a salesman because his intermittent longshoring work in the subsequent period and just prior to his work for employer at the time of his injury did not reasonably and fairly represent claimant's true wage-earning capacity. The Board and the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction the instant case arises, affirmed the administrative law judge's finding, holding that the intermittent nature of claimant's employment in the 52-week period leading up to his work injury supported the determination that claimant's wages during that period did not reasonably and fairly represent his wage-earning capacity. The Fifth Circuit also approved the Board's decision in *Anderson v. Todd Shipyards*, 13 BRBS 593 (1981), which held that if average weekly wage is calculated by considering the claimant's earning history over a period of years prior to the injury, all the years within the selected period must be included. *Gatlin*,

[5] Additionally, we affirm the administrative law judge's decision to not consider evidence of claimant's wages, particularly for 1996 and 1997, which employer attached to its post-hearing brief, as that decision was not arbitrary, capricious or an abuse of discretion. *Cooper v. Offshore Pipelines International, Inc.*, 33 BRBS 46 (1999); *see generally Smith v. Ingalls Shipbuilding Div., Litton Systems Inc.*, 22 BRBS 46 (1989); *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987). In this regard, the administrative law judge specifically found that this evidence was inadmissible since "the record has closed and claimant did not have a chance to examine or object to any of the attachments to [employer's] post-hearing brief," Decision and Order at 2, n. 4. *Id.* Employer's evidence regarding claimant's earnings consist of a West Gulf Maritime Association Earnings History spanning 1998 through 2003, EX 11, and Social Security Administration Records for 1996-2000, EX 12. While the former evidence is not relevant to 1996 and 1997, the latter records are illustrative of claimant's earnings in those years. Nonetheless, the administrative law judge's decision, in its entirety, supports the exclusion of claimant's earnings in these years for the same reason he declined to use claimant's earnings between 2000-2003, *i.e.*, claimant's earnings were not representative of his true earning capacity because his work was significantly limited by personal illness and/or injury. *See* Decision and Order at 28; *Klubnikin*, 16 BRBS 182; *Richardson*, 14 BRBS 855.

936 F.2d 819, 25 BRBS 26(CRT); *see also New Thoughts Finishing Company v. Chilton*, 118 F.3d 1028, 31 BRBS 51(CRT) (5th Cir. 1997). As such, *Gatlin* does not support employer's position that the administrative law judge must use all of claimant's earnings between 1996 and 2003 to calculate his average annual earnings pursuant to Section 10(c). The administrative law judge, in utilizing claimant's wages in 1998 and 1999, did precisely what was required; *i.e.*, he rationally found claimant's earnings during a period of years prior to the injury, 1998-1999, best represented his earning capacity, and he included all of claimant's earnings during the selected period in his calculations. *Id.*

Moreover, the record supports the administrative law judge's decision to forgo including claimant's earnings between 2000 and 2003, because they do not reasonably reflect claimant's true earning capacity. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *see generally Staftex Staffing*, 237 F.3d 404, 34 BRBS 44(CRT) (it is proper, in calculating a claimant's average weekly wage under Section 10(c), to account for time lost due to another unrelated injury). Claimant's undisputed testimony establishes that he had significant breaks in his longshore employment due to "some illnesses." HT at 27. In particular, claimant testified that a broken ankle left him out of work for 11 months in 2000, and that he was only able to work about four months in 2001, prior to sustaining a second broken ankle, which ultimately left him unable to work for almost the entire next two years.[6] HT at 28, 44-45; *see Klubnikin*, 16 BRBS 182; *Richardson*, 14 BRBS 855. In contrast, claimant testified that "1998 was probably close" to a complete year of work, as was 1999, although hernia surgery limited his work in that year. HT at 27, 35. The administrative law judge thus rationally found that an average of claimant's total earnings in 1998 and 1999, represents "a fair and reasonable approximation" of claimant's average annual earning capacity. Decision and Order at 28. As the result reached by the administrative law judge under Section 10(c) is reasonable, is supported by substantial evidence, and is consistent with the goal of arriving at a sum which reasonably represents claimant's annual earning capacity at the time of his injury, it is affirmed. *See Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT); *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003).

[6] Claimant also testified that his work between 1995 and 1998 was likewise significantly limited due to other health problems, *i.e.*, diverticulitis (1995) which required a colostomy (1995-1996) and which led to three separate surgical procedures (a colostomy removal in 1996, and two hernia operations in 1997 and 1999). The administrative law judge's average weekly wage findings correctly factor in claimant's inability to work during these times because of unrelated injuries. *See Klubnikin*, 16 BRBS 182; *Richardson*, 14 BRBS 855.

Employer lastly argues that the administrative law judge erred by awarding continuing medical benefits as the evidence of record is sufficient to establish that claimant has reached maximum medical improvement and is in need of no further treatment with regard to all of his work-related injuries. Employer relies on the opinion of Dr. Vandeweide that claimant demonstrated degenerative changes throughout the cervical spine consistent with a disease of life and unrelated to the November 29, 2003, work accident, with no evidence of aggravation or acceleration, to establish that claimant's need for further treatment related to his back condition is not related to said accident.

Section 7(a) requires an employer to pay for all reasonable and necessary medical expenses arising from a work-related injury. 33 U.S.C. §907(a); *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). In determining whether the condition is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after the claimant establishes a *prima facie* case, *i.e.*, the claimant demonstrates that he suffered a harm and that an accident occurred, or conditions existed, at work which could have caused the harm. *Gooden v. Director, OWCP*, 135 F.3d 1066 , 32 BRBS 59(CRT) (5th Cir. 1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Bunol*, 211 F.3d 294, 34 BRBS 29(CRT); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden*, 135 F.3d 1066, 32 BRBS 59 (CRT). If the employer rebuts the presumption, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *See Prewitt*, 194 F.3d 684, 33 BRBS 187(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Employer is liable for the resulting sequelae of the original injury. *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994).

The administrative law judge found, based on claimant's testimony, as bolstered by the opinions of Drs. Moers, Eidman and Nowlin, that claimant's current back condition could have been caused by his November 29, 2003, work accident. He then found that employer rebutted the presumption as "the record contains evidence that claimant's back problems could be purely a consequence of natural progression and not accelerated by the trauma of the fall." Decision and Order at 26. According greatest weight to the opinions of Drs. Moers, Eidman and Nowlin, who tied claimant's present

back condition to his work accident on November 29, 2003,[7] in conjunction with evidence indicating the absence of back complaints prior to the subject accident, the administrative law judge concluded that the weight of the evidence of record establishes that claimant's current back condition was either caused by the fall, or at the very least, is a pre-existing condition aggravated or accelerated by the fall. As the administrative law judge's finding, based on the record as a whole, that claimant's back condition is related to his November 29, 2003, work accident, is supported by substantial evidence, it is affirmed. *Bunol,* 211 F.3d 294, 34 BRBS 29(CRT)*; Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005); *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997).

Pertaining to the medical benefits issue, the administrative law judge first observed that only Dr. Vanderweide suggested that claimant did not require any further medical care. Decision and Order at 27. In contrast to Dr. Vanderweide's opinion, the administrative law judge found that Drs. Moers, Eidman and Nowlin each recommended that additional testing be done to discern claimant's need for continued treatment. Relying on his prior decision to accord greater weight to the opinions of claimant's treating physicians, Drs. Moers and Eidman, as well as the independent opinion of Dr. Nowlin, the administrative law judge found that the lumbar and additional cervical MRI and bilateral upper extremity EMG/NCV tests are reasonable and necessary for claimant's work-related injury.[8] Decision and Order at 27. Moreover, the administrative law judge found that all care claimant obtained from Dr. Eidman, and from Dr. Moers after November 29, 2003, was reasonable and necessary. *Id.* The administrative law judge's award of medical benefits is therefore affirmed as it is rational, supported by substantial evidence and in accordance with law. 33 U.S.C. §907(a); *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002); *Romeike*, 22 BRBS 57.

[7] Dr. Moers opined that claimant's present cervical and lumbar complaints were related to the November 29, 2003, accident. CX 21. Dr. Eidman stated that he concurred with Dr. Moers's diagnosis, opining that claimant sustained cervical, lumbar and thoracic sprains with probably associated cervical and/or lumbar disk herniation as a result of his November 29, 2003, work accident. CX 22. Dr. Nowlin also opined that "there does appear to be a causal connection" between claimant's injuries, including his cervical injury, and the November 29, 2003, work accident. CX 17.

[8] The administrative law judge however found that the ankle MRI is not "reasonable and necessary." Decision and Order at 27.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge